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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	DOCKET FILE COPY ORIGINAL
	)	
Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-266
	)	
	)	CS Docket No. 96-60
Leased Commercial Access	)	

REPLY COMMENTS OF

DENVER AREA EDUCATIONAL TELECOMMUNICATIONS CONSORTIUM, INC.[1]

Introduction and Summary

This proceeding will serve as the acid test of a novel proposition: that a federally-regulated industry can frustrate the intent of Congress, as clearly set forth in the law, for an indefinite period stretching back to the Reagan era and forward into the next millennium. Clearly, it would inspire greater confidence in democracy if the test results prove negative. But the cable industry's track record of stonewalling its leased access responsibilities to date has been so successful, and its present full-court press against effective rules so fervid, that

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[1] Denver Area Educational Telecommunications Consortium, Inc., ("DAETC") is a Colorado non-profit corporation. As described herein, From 1989 to 1995, DAETC operated a leased access program service known as The 90's Channel. The 90's Channel was forced off the air when DAETC's channel lease with Tele-Communications, Inc. ("TCI") expired and TCI imposed impossibly high renewal rates.

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one cannot be entirely sanguine.

Let us briefly review the history of leased commercial access.

In the 1984 Cable Act, Congress sought to temper cable operators' near-monopoly control over their program content by mandating that they lease as much as 15% of their channel capacity to unaffiliated parties. In so doing, Congress wrote:

> The overall purpose of [Section 612 of the Act] is to prohibit any editorial control by the cable operator over the selection of programming provided over channels designated for commercial leased access...[2]
>
> Cable operators clearly have an incentive to provide a diversity of program services... However, cable operators do not necessarily have the incentive to provide a diversity of programming sources, especially when a particular program supplier's offering provides programming which represents a social or political viewpoint that a cable operator does not wish to disseminate, or the offering competes with a program service already being provided by that cable system.[3]

The 1984 Act did not regulate leased access rates, instead assuming that a market for channel capacity would develop.[4]

Eight years later, Congress found that it had erred. Amidst a record that showed that very few channels had been leased, it concluded that leased access programming was by its nature material a cable operator had decided not to carry, and "[t]o permit the operator to establish the leased access rate thus

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[2] See H. Rep. No 98-934, 98th Cong., 2d Sess. (1984) (hereinafter "1984 House Report"), p. 51.

[3] Id., p. 48.

[4] Id., p. 50. ("Marketplace negotiations over use of leased access channels should result in the establishment of fair rates.")

makes little sense."[5] Congress's prescription: to assign the FCC the job of regulating rates, terms and conditions of leased commercial access.

The Commission undertook this task in 1993, amidst the blizzard of post-1992 Cable Act rulemakings. It bundled the leased access issues with what probably was the most contentious of these proceedings: consumer cable rates.

The combined rate regulation decision was adopted on April 1, 1993.[6] The FCC's prescription for maximum leased access rates---based on what was dubbed the highest implicit fee---originated from comments submitted by cable interests.[7]

Even the cable industry does not deny that in the intervening three years the Commission's rules on maximum reasonable rates have done essentially nothing to breathe life into commercial leased access.[8] In fact, the reverse occurred: pre-1993 leased access programmers were endangered when their contracts expired and cable operators sought to impose rates based on the highest implicit fee.[9] The reason is that the current "maximum reasonable rate" is impossibly high. No one---

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[5] See S. Rep. No. 102-92, 102nd Cong., 1st Sess. (1992) (hereinafter "1992 Senate Report"), pp. 31-32.

[6] Report and Order and Further Notice of Proposed Rulemaking in MM Docket No. 92-266, FCC 93-177

[7] Id., paragraph 517 et seq.

[8] Comments of the National Cable Television Association ("NCTA"), p. 3.

[9] United Broadcasting Corp., d/b/a Telemiami, v. TCI TKR of South Dade, Inc. (CSC 366), Denver Area Educational Telecommunications Consortium, Inc. v. Tele-Communications, Inc., et al (CSR 4595L).

from small non-profit groups to major media conglomerates---can pay these fees, because there is no way to break even, let alone make money, under such a pricing regime.

In the instant rulemaking, the Commission has proposed a new approach to setting maximum reasonable rates. If a given cable system has not leased its allotment of channels to be leased, the rate would be based upon net opportunity cost. If it has, the rate will be based upon a bidding process among prospective lessees.[10] The FCC did not propose lower rates for non-profit programmers, but said that it was concerned that they are being excluded from leasing and asked for comments as to whether pricing has anything to do with it.[11]

The Commission's net opportunity cost proposal is, at its core, well thought out. As the cable industry loudly protested in various comments, fees based upon net opportunity costs will be low. Thus, if a cable operator continues to stonewall with respect to channel leasing, it will have to lease capacity at mandatory low rates. When the stonewalling ends, a bidding mechanism will take over and establish a market rate. This is a fair proposal. And unlike the others which have been tried since 1984, it will work.

DAETC's Channel Leasing Experience

DAETC for six years operated a leased access program service

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[10] Order on Reconsideration of the First Report and Order and Further Notice of Proposed Rulemaking in the above-captioned proceeding ("Order on Reconsideration"), paragraphs 61-97.

[11] Id., paragraphs 111-112.

known as The 90's Channel, which was carried on a number of cable systems operated by Tele-Communications, Inc. Our experience with The 90's Channel contradicts a number of key assertions put forward by cable industry commenters in this proceeding.

First, some industry comments have asserted that leased access programming cannot survive unless it consists of infomercials or home shopping. TCI and Time Warner, for example, claim that basic cable programming requires the dual revenue stream to operator fees and advertising to survive.[12] Yet despite the fact that The 90's Channel's programming consisted chiefly of documentaries and magazine programs, it survived for six years without receiving carriage fees from the cable operator.

Second, industry comments presume that leased access programming will be less popular than programming which operators now carry as part of their basic tiers. These comments assert that if leased access programming is carried, subscribers will disconnect, adding to operators' opportunity costs.[13]

DAETC's experience demonstrates that quite the contrary can be true in practice.

In late 1992, TCI commissioned research on The 90's Channel, which was carried out by Talmey-Drake Associates of Boulder,

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[12] TCI comments, p. 5; Time Warner comments, p. 2. These comments contain inherent contradictions. If, as these parties argue, channel leasing is not practical due to the fact that cable operators do not pay lessees for programming, then there can be no threat to cable systems or existing programmers posed by low leased access rates.

[13] See, for instance, NCTA Comments at p. 13-14; TCI Comments at pp. 17-19.

Colorado.[14] Subscribers who had watched The 90's Channel preferred DAETC's service over various networks which TCI and other cable operators commonly carry on their basic tiers. For instance, among these viewers The 90's Channel was preferred over Court TV by 55% to 37%; over Mind Extension University by 57% to 36%; over a local news channel 55% to 41%; over The Cartoon Channel 58% to 39%; and over E! by 50% to 42%. More than 20% of these viewers said they would probably or definitely subscribe to the 90's Channel for an extra $1 per month.[15]

This survey did not prevent TCI from massively raising The 90's Channel's rates and dropping our network when we could not pay. While such action initially seems irrational, DAETC believes that there is a basis for it---one that Congress anticipated when it adopted leased commercial access: "[C}able operators do not necessarily have the incentive to provide a diversity of programming sources, especially when a particular program supplier's offering provides programming which represents a social or political viewpoint that a cable operator does not wish to disseminate..."[16]

The 90's Channel carried a diverse mix of controversial programs with a liberal point of view. The network criticized

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[14] This is the same firm TCI hired to conduct survey research in support of its position concerning leased commercial access. See TCI Comments, Attachment G.

[15] In light of these results, it is intriguing that TCI chose in its comments to single The 90's Channel out for obloquy, characterizing it as not only repetitive but also "perceived by subscribers to be indecent or otherwise offensive." See TCI Comments at footnote 67, p. 34.

[16] 1984 House Report, p. 50.

the Persian Gulf war, revealed inhumane prison conditions, reported on President Bush's Iran-contra ties, championed the rights of gays and lesbians, backed trade union organizers and exposed corporate polluters.

John Malone, TCI's president, is well known for his conservative political views. Ted Turner recently was quoted as follows: "John Malone's a good friend of mine---on our board of directors. But as it has been widely reported, **he's a little to the right of Attila the Hun**. He stays up late and watches Rush Limbaugh every night...."[17] [Original emphasis.] At the same time that TCI sought to drop The 90's Channel, it was making plans to carry conservative networks and was producing conservative programming, including one TV series aptly entitled *Damn Right*.[18]

Further, DAETC's experience directly contradicts the assertions of various cable interests that high leased access rates are not the principal bar to channel leasing.[19] To the contrary: <u>The 90's Channel would be on the air today if it were not for excessive lease fees</u>.

DAETC notes that the Center for Media Education filed a survey of leased access channel rates charged to non-profit organizations by cable operators.[20] Of responses CME received,

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[17] "Through the Wire," <u>Multi-Channel News</u>, February 12, 1996.

[18] See articles attached to these reply comments as Appendix A.

[19] See, for example, NCTA Comments, p. 3, Time Warner Comments, pp. 1-2.

[20] CME Comments, Appendix B.

rates ranged between 45 and 64 cents per subscriber per month. These rates are comparable to, and, in a number of cases, higher than the rates that drove The 90's Channel off the air. Neither DAETC, nor any basic cable programmer---either for-profit or non-profit---can afford to pay the rates quoted by cable companies in the CME survey. In contrast, based on its experience DAETC is confident that The 90's Channel and other prospective lessees could operate successfully on leased access they were able to avail themselves of a lease rate based on net opportunity cost.

Cable Operators Have Attacked Leased Access Programming With Flawed Research

The cable industry has used this proceeding to attack leased access programming unfairly, using flawed research.

Time Warner, for instance, cites an in-house survey which it says showed that 68% of leased access programs on its systems consisted of infomercials, and that some were sexually explicit.[21] One needs to keep in mind that very little channel leasing now occurs. Further, it occurs under a pricing regime in which the "reasonable" maximum pricing is unreasonable. It is little wonder that only high-revenue uses like infomercials can survive---and unsteadily at that.

TCI tenders a survey purporting to show that large numbers of subscribers will defect if certain named popular cable channels are deleted.[22] However, TCI's pollsters neglected to

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[21] Comments of Time Warner, pp. 30-31.

[22] TCI Comments, Attachment G.

inform survey participants that deleted channels would be replaced by others of greater interest, which its own research showed to be the outcome in the case of The 90's Channel.

None of these survey results comes close to predicting the results of a flourishing leased access programming industry. The very fact that leased access programmers receive no fees from cable operators means that they have to be effective programmers to survive. If they program effectively, their programs will---contrary to the cries of the cable industry---contribute to, rather than detract from, the value of cable subscribership.

Impact of Channel Leasing on Cable Programmers

One of the key misconceptions propounded by the cable industry in this proceeding is that it will harm new cable networks if the Commission makes it feasible to lease channels. To the contrary, many new networks will be born out of effective leased commercial access. The difference is that these new entrants will not be hand-picked by the cable operators, shaken down for ownership stakes in return for carriage, or vetted for ideological acceptability.

This fact illustrates a central issue which is obfuscated rather than elucidated by the economic filings of cable companies. Consider NCTA's erroneous argument, which bootstraps off of the Commission's findings on double recovery:

> If the Commission's theory were correct, an operator would have every financial incentive to lease channels even if the rate charged to the lessee were only a penny over what it would gain from subscribers. This is because any marginal revenue that exceeds marginal costs would be a profit maximizing strategy. As

> Economists Incorporated explains, if there truly were a "double recovery," <u>[c]able operators should be replacing cable networks with leased commercial access channels in order to increase their profits. Since that replacement is not occurring, the Commission's calculation of the costs and benefits associated with leased commercial access must overlook some costs</u>.[23]

The truth is otherwise. Cable operators are not dropping basic networks in favor of leased access networks because of the economic rents cable operators derive as a result of their monopsony position <u>vis a vis</u> program suppliers. Cable companies oppose commercial leased access because it provides a route around monopsony roadblocks for new programmers, and, as a result, a lever for existing programmers eventually to argue for better financial terms.[24]

<u>Cable Operators Falsely Claim That They Have Already Accomplished the Purposes of Section 612</u>

Various cable interests have claimed that leased access does not need to work because cable networks have grown more numerous since 1984.[25] These claims are entirely incorrect. As quoted above, Congress's purpose in establishing leased access is to create an exception to the editorial <u>control</u> of cable operators. One cannot claim that this purpose has been achieved because

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[23] NCTA Comments, pp. 19-20. [Emphasis added.]

[24] The cable industry may cite here Section 612(c)(1) of the Cable Act which states that leased access should not harm the financial condition or market development of cable systems. DAETC has searched the law and its legislative history in vain for any suggestion that Congress intended to protect cable operators' monopoly or monopsony profits. Quite to the contrary, Congress amended Section 612(a) in 1992 to add a second purpose: promoting competition.

[25] See, for instance, the Comments of Time Warner, pp. 25-26; Comments of NCTA, pp. 4-6.

cable operators have added more channels which are under their control.

It is noteworthy here that under the law cable operators' leased obligations increase, rather than decrease, according to the number of channels they activate.[26]

The Question of "Disruption" Posed by Channel Leasing

Various cable interests complain loudly about the disruption which they aver channel leasing will cause. TCI goes so far as to present the Commission with a "hit list" of networks which it has tentatively designated for deletion.[27] DAETC notes that while some of cable's finer offerings, such as C-SPAN and Bravo are on the list, HSN, QVC, The Playboy Channel, and Spice are not. This fact alone leads one to question whether one should place one's full trust in the editorial discretion of cable operators. DAETC believes that TCI has placed many of the networks on its "hit list" in an effort to alarm the Commission.

More profound, and more disturbing, is the fact that the cable industry is justifying future non-compliance with Section 612 based upon its thorough-going record of past non-compliance. While the law requires as much as 15% of channel capacity to be leased, Time Warner now comes before the Commission to complain that more than 90% of its systems have no unused channel capacity.[28] Given that leased access has been a requirement for

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[26] Section 612(b)(1) of the Cable Act.

[27] TCI Comments, pp. 8-9.

[28] Time Warner comments, p. 3.

more than a decade---and that Congress found a pattern of unreasonable conduct when it passed the 1992 Act---it is impossible to reconcile the industry's behavior with good faith concerning leased access. It would be unconscionable for the Commission to defer effective implementation of the law based upon a record of bad faith.

At bottom, DAETC believes that cable operators are adverse to the idea of leasing to entities which are beyond their editorial control, notwithstanding their legal obligation to do so. Time Warner writes:

> As an initial matter, the Commission must recognize that cable operators have broad editorial discretion to select programming services. [Footnote omitted.] As discussed more fully below, it is the ability to select programs that enables cable operators to create packages that appeal to a broad range of consumers. CLA [cable leased access], by its nature, restricts this editorial function... [T]he Commission has a constitutional as well as a statutory, obligation to minimize the impact of CLA on cable operators' editorial function.[29]

Of course, what such arguments ignore is that the very reason Congress wrote leased access into the law was to restrict the editorial discretion of cable operators. If the industry has a central complaint, it is with the very purpose of the law.

Channel Leasing by Non-Profit Entities

As a non-profit entity, we agree with the Center for Media Education, et al ("CME"), that the Commission should take special measures to ensure that non-profit organizations are not shut out

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[29] Comments of Time Warner, p. 6.

of channel leasing.[30]

We believe that a variety of non-profits, including DAETC, will be able to afford to lease channels when rates are based upon net opportunity cost. However, by their very nature, non-profits are supposed to function outside the market, and will be excluded if they are forced to pay market rates to lease. As a result, DAETC endorses CME's approach of reserving a portion of leased access capacity for non-profit groups, with their rates capped at net opportunity cost.

"Gaming the System"

DAETC agrees with both CME and Video Information Providers for Non-discriminatory Access ("VIPNA") that the major loophole in the Commission's proposal is that it bases rates on a "basket" of services, and leaves the cable system in charge of selecting what the basket contains.[31] Both CME and VIPNA quite correctly have recommended eliminating the pricing basket, or prescribing what it can contain.[32] We further agree that it would be ill-advised to allow cable operators to set rates based upon secret data, or to appoint the accountants who are supposed to superintend the rate-setting process.[33]

The Issue of Home Shopping on Leased Access

Given their sharply differing perceptions on other leased

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[30] CME comments, pp. 16-24.

[31] Comments of CME pp. 9-11; Comments of VIPNA, p. 9.

[32] Id.

[33] See CME Comments, pp. 11-12, 32.

access issues, it is intriguing that such commenters as Time Warner and VIPNA expressed concern that a "monoculture" of home shopping and infomercial programming could take over cable leased access.[34] While DAETC does not believe that such a monoculture will develop as long as rates are derived from net opportunity cost, we do believe that a system based on competitive bidding could yield such a result, since shopping channels are devoted exclusively to advertising and thus generate revenues in excess of those earned by other basic cable networks.

Because Section 612 originated from Congress's desire for diversity, DAETC believes that it would be contrary to the purposes of the law---not to mention the public interest---for home shopping and infomercials to dominate leased access. However, this outcome can be prevented without maintaining rules that cripple channel leasing in general. For example, the Commission could specify that channel lessees can devote no more than 30% of their airtime to advertising.

<u>Migration</u>

DAETC further agrees with cable industry comments to the effect that low leased access rates may encourage the migration of certain existing program networks to leased access channels.[35] Migration of existing channels of course cannot add to the diversity of program sources or provide competition, as intended

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[34] See, for example, Comments of Time Warner, p. 3; Comments of VIPNA, pp. 10-11.

[35] See NCTA Comments, p. 17;

by Section 612. However, as CME points out, migration can be barred by the Commission, just as Congress barred it by law for services carried on cable systems prior to 1984.

Conclusion and Awards

One irony of the current proceeding is that the cable industry has hired some of the country's most prominent media lawyers and economists to defend a position which is intellectually untenable: that the Commission should adopt rules which frustrate rather than carry out the law. Harnessing such formidable brainpower to generate so much paper in pursuit such an impossible goal was sure to produce its share of risible arguments. The image of Ivy League-trained waiters serving heaping trays of canard to the Commission comes to mind.

With this as a backdrop, and with at least a patina of good humor, DAETC closes its reply comments with a roster of awards.

The Really, Seriously Confused Argument Award goes to Time Warner for averring the following: "The minimal demand for CLA [cable leased access] which does exist is anecdotal and episodic. There is no evidence of general unmet demand on an industry-wide basis that would justify a change in the CLA rate formula... [A]s one CLA programmer has stated, it would be 'Pollyannaish to say that if you reduce the costs of leased access, the new programming would flood in.'"[36]

If lowering leased access rates won't make a major difference, why have Time Warner and others expended so much

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[36] Comments of Time Warner, pp. 27-28.

effort trying to keep them high?

The Mischievous Implications Award goes to TCI for making the following (rather qualified) offer: "Assuming the Commission establishes a compensatory leased access rate, TCI intends to attempt to negotiate below that maximum rate with certain potential leased access users. Specifically, TCI believes that educational, minority and local programming will bring more value and certainly less harm to a cable system than, for example, additional shopping channels or infomercial services."[37]

There are several implications flowing from these statements, some of which are profound. First, given that TCI has had broad pricing flexibility for leased access since 1984, why is it now bringing such an offer before the Commission? DAETC speculates that the prospect of truly reasonable rates may be proving a tonic. Second, although DAETC agrees with the programming values TCI espouses, the offer displays a continuing desire to control the content of leased access channels---directly contravening the purposes of the law. Unaffordable rates allow cable operators to control leased access content, because they can hand-pick lessees, just as they now hand-pick their tier programmers; because affordable rates remove this discretion, they advance the purposes of the law.

Finally, if TCI's offer to lease channels is to be taken seriously, it directly contradicts its own argument that channel leasing is counterproductive even at low rates because leased

[37] TCI Comments, pp. 25-26.

access programmers lack a dual revenue stream.[38]

The C'mon Guys Award goes to Time Warner for claiming that leased access could require 10 additional employees per system, equipment cost exceeding $100,000 under certain circumstances, and up to 100 square feet of floor space.[39] DAETC has leased channel capacity on numerous cable systems. We provided all the operators, some of whom were moonlighting cable company employees. We provided all the equipment, which occupied about half of one 19" equipment rack. Had our programming been delivered by satellite rather than videotape, all of these logistics would have been even less intrusive. Cable company costs were limited to the very minor expense of day-to-day liaison with us, which the Commission has already proposed to allow operators recoup through reasonable administrative charges.[40]

The Janus Administrative Law Award goes to TCI for claiming that the Commission cannot require cable operators to place leased access channels on basic or expanded tiers,[41] despite the Commission's expansive regulatory powers and the fact that

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[38] See TCI Comments at p. 5. "[t]he only program services that can use leased access are those that generate significant revenues through nonsubscriber sources. Leased access, therefore, will rarely be used except by entities devoted primarily to direct sales." [Footnote omitted.] Other cable interests submitted similar comments. See Time Warner comments, p. 2.

[39] Comments of Time Warner, p. 19.

[40] Order on Reconsideration, Appendix C.

[41] TCI Comments, pp. 22-24.

Congress clearly intended for it to do so.[42] TCI argues that the FCC should hew to the literal language of the statute rather than the legislative history; however, in another part of the same comments, TCI itself relies upon legislative history to buttress its arguments.[43] Of course, behind this legal sparring is the fact that leased access programmers will be quite unable to survive if they are relegated to serving small numbers of subscribers, an outcome that does not appear to trouble TCI.

<u>The Cover Your Tracks Award</u> goes to TCI for asking that the Commission eliminate the requirement of Rule Section 76.970(e) that cable operators tell potential lessees how much of their leased access set-aside capacity is available.[44] The fact is that cable operators have to keep track of the set-aside in order to insure their own compliance, and there is minimal additional burden in disclosing this information to others. We believe that the real reason TCI wants this rule amended is that it is reluctant to admit how few channels it currently leases.[45]

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[42] 1992 Senate Report, p. 79.

[43] TCI Comments, p. 4, footnote 10.

[44] TCI Comments at pp. 49-50.

[45] In the future, DAETC hopes to supplement the record before the Commission regarding leased access channel usage.

Respectfully submitted,

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Appendix A

Liberal cable channel fears being pushed out

By Judith Kohler
Associated Press

The founder of what is believed to be the country's only full-time liberal television network says the venture could be facing extinction due to what he calls the conservative politics of cable giant Tele-Communications Inc.

The 90s Channel, based in Boulder, is carried on seven of TCI's systems, but John Schwartz fears the plug will be pulled once his contract expires later this year. And if that happens, he will blame a desire by TCI, the country's largest cable carrier, to win favor with the conservative forces in charge of Congress.

"I think to have a healthy society, you need many different points of view," said Schwartz, who started The 90's Channel in 1989. "You have really one gatekeeper for everybody.

COMMUNICATIONS

It's a very unhealthy situation, especially when they try to take an ideological stand."

Schwartz and the director of a media public interest group point to the lineup of conservative-oriented programming that Englewood-based TCI carries or is considering carrying, including programs prominently featuring U.S. House Speaker Newt Gingrich.

John Malone, TCI's chief executive officer, wields great power because roughly half of the country's cable subscribers get their service from TCI, said Jeff Chester, executive director of The Center for Media Education in Washington, D.C.

"He's the Citizen Kane of the '90s, John Malone," Chester said. "He can make or break people."

A TCI official, though, says the company is just trying to give its 10 million-plus subscribers the best programming possible.

"We're always interested in doing deals with any cable-TV program that comes forward with a viable product — conservative, liberal or middle of the road," said Jedd Palmer, TCI's senior vice president in charge of programming.

He said the company is in negotiations with the conservative-oriented National Empowerment Television, Conservative Television Network and the "multipartisan" American Political Channel.

In response to criticism that the company is stacking programming in favor of more right-wing politics, TCI official Robert Thomson has said the company hopes more liberal-oriented networks come forward.

Palmer echoed that sentiment.

"That's our business, selling programming that people want to watch, peculiarities of any individual program notwithstanding," he said.

In 1992, TCI notified The 90's Channel of plans to drop the network from its channels. But the network, which has about 1 million subscribers throughout the country, had a contract with United Cable, which was absorbed by TCI. That contract was supposed to run through 1995 with the option of two, one-year extensions.

Schwartz, who also founded public TV station KBDI in Broomfield, went to court to enforce the contract. TCI agreed to carry the network through Oct. 31.

Palmer said TCI is willing to talk to Schwartz about renewing the contract.

Stop the TCI censors

THE LARGEST cable television operator in the country has just demonstrated why it needs far tighter regulation — and why San Francisco needs to be paying attention.

As Daniel Zoll reports on page 17, Tele-Communications Inc., which just bought the city's cable system, has blacked out the only full-time progressive political TV network in America. The '90s Channel, based in Boulder, Colo., had leased space on seven TCI systems, broadcasting 24 hours a day and offering high-quality alternative programming to more than 600,000 subscribers in five states.

Access to the cable lines was, and is, a legal right: under the 1984 law that deregulated cable television, monopoly franchises are required to make available a designated number of channels to anyone who can pay to lease the time. But companies like TCI quickly figured out the perfect loophole. The law didn't control lease rates — so the companies have jacked the prices up so high that no community producer can afford to buy the time.

That's what happened to the '90s Channel. On Oct. 31 the station was hit with a huge increase in its access fee. The station offered to pay $7,000 a month. TCI demanded $250,000 — a hike of 3,471 percent. For a small, struggling operation, that was as good as a blackball. On Nov. 1, the '90s Channel, which has championed gay and lesbian rights, challenged inhumane prison conditions, investigated the Iran-Contra scandal, and earned accolades from *Rolling Stone*, the *Wall Street Journal*, *TV Guide*, and the *L.A. Times*, dropped off the TCI network.

Of course, TCI has plenty of room for right-wing programming. Newt Gingrich's National Empowerment Television, the Conservative Television Network, and Pat Robertson's Family Channel are all still carried on TCI. And so far the Federal Communications Commission has refused to do anything about the rate increase.

San Francisco doesn't have to stand for that. Since TCI bought out Viacom's control of the city's cable franchise, local officials have had a tremendous opportunity to force the giant cable monopoly to negotiate a deal that fits the city's needs. But so far the city — facing a $600 million budget deficit and huge new demands for public services — has simply rolled over. The City Attorney's Office has not challenged TCI's contention that the sale of Viacom's franchise requires no new franchise agreement. The mayor and the supervisors have been remarkably quiet on the issue. Nobody is challenging TCI on the basic point: The company can't and shouldn't be given a license to operate in San Francisco until it agrees to terms very different from the generous deal Viacom always enjoyed.

The ultimate goal of any new franchise agreement ought to be twofold: It should protect the rights of public access to the cable system, and it should guarantee the city a reasonable financial return. The first requires strong language, and specific terms, to prevent TCI in San Francisco from doing what it has done to the '90s Channel elsewhere in the country. Dirt-cheap lease rates (no more than $200 an hour) for at least 10 percent of TCI's local-access channels should be a nonnegotiable provision in the new franchise. So should a substantial annual assessment — say, $1 million a year — to pay for independent public-, educational-, and government-access channels and programming.

Meanwhile, the city needs to recognize that TCI, a $5 billion operation, is one of the biggest, richest media syndicates in the world, and that it can well afford to pay for the right to have monopoly access to one of the most lucrative media markets on earth. Viacom was paying 5 percent of gross, the maximum the city can force a contractor to pay under federal law. Certainly TCI's franchise fee shouldn't be lower — and since we have leverage, we should demand a voluntary waiver that could set it higher.

Control of the communications infrastructure is one of the critical issues of the 1990s. And for better or for worse, it's up to City Hall. Let's get a regulatory commission in place and get a timely report on the negotiations with TCI. No more waffling and wavering, folks: Let's win one for the '90s Channel.

PG&E's public-power study

PACIFIC GAS and Electric Co., which has done everything possible for 80 years to keep public power out of San Francisco, just got a nice helping hand from the city. The S.F. Public Utilities Commission has awarded the contract for a feasibility study on municipalization to a company whose project manager is a former PG&E executive whose job for 13 years was to help the private utility negotiate better deals for its biggest industrial customers (see "Fox Guards Henhouse?" page 8).

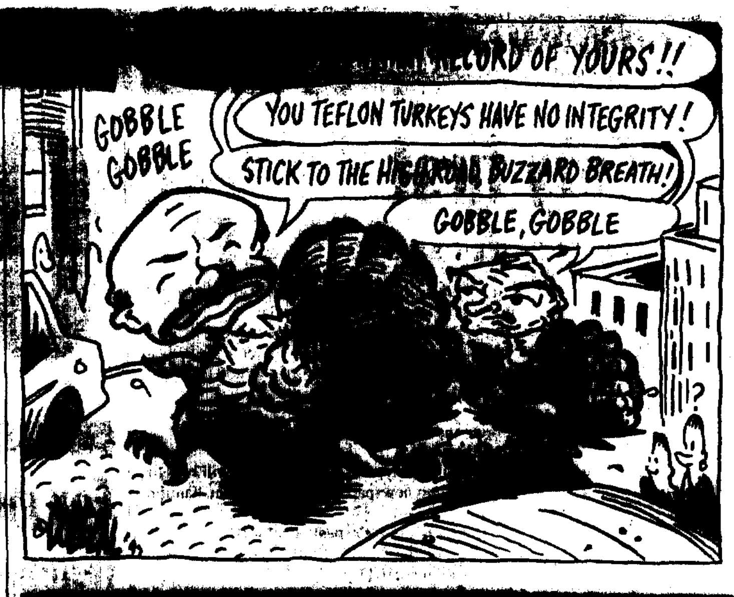
It's ironic: the commission balked at pursuing experienced firms like R.W. Beck and Associates, which has conducted similar studies for numerous cities, because of a fear of a "public-power bias." But hiring a firm that, to quote public-power advocate Joel Ventresca, "has PG&E's fingerprints all over it" — that's perfectly acceptable?

Equally alarming, both the PUC and the firm, Strategic Energy Limited, are refusing to disclose key information about the contract. SEL officials won't provide access to previous work the firm has done that could demonstrate its experience in the field; that information is "proprietary." And the PUC won't even tell us who was on the screening committee that chose SEL.

SEL's Phillip Muller insists his PG&E connections won't cloud his judgment or bias his company's findings. But there's no question that the contract has the appearance of a conflict — and the only way the study can have any hope of winning public confidence is for the entire process to be open, beginning to end. Every source document, every memo, every interview, every phone call, every scrap of information that goes into the final study has to be a matter of public record. The PUC should make that perfectly clear to SEL, and if the former PG&E executive's firm doesn't want to comply, the city should void the contract and find someone who will.

Meanwhile, the supervisors' public-power committee should hold hearings and get to the bottom of this: how did a PG&E-friendly firm get San Francisco's critical contract to study public power?

GUARDIAN GRAPHIC BY JERRY DOLEZAL



Mayhem

BY MARIANNE KELLY

"THE GUY might lose his eye," the police officer was saying to me over the telephone. "They're working on him now at Presbyterian, up on the hill.

The kid who did this is 15 years old. There's this charge called mayhem. The D.A. can kick it down if he wants to, but that kid is going to sit for a long time."

It was my third Halloween in the Western Addition. Another year in an apartment on a street a block away from the Hayes Valley housing project. When I had heard what sounded like a gunshot less than an hour before, I didn't even bother to look out the window. I had learned not to.

> When the police officer told me that the perpetrator of this vicious act was 15 years old, I thought of the Million Man March in Washington, D.C. I wondered if there was a father in this boy's life.

Then I heard the commotion. The sound of angry voices. A lot of them. I looked down four stories to the scene out on the street. A young man dressed in black on a shiny red motorcycle stopped in the middle of the street. Another young male lying in the middle of the street, wearing what must have been his Halloween costume — a striped serape, light cotton clothing, and a sombrero.

Half a block away, under the diffuse light of the street-corner lights and the apartment windows, there were at least half a dozen young African American males dressed in baggy jeans and a lot of navy blue. Words continued to be exchanged. The group moved toward the motorcycle and the young man still lying in the middle of the street, and an attempt was made to pull the motorcyclist off his bike. He resisted. A metallic silver helmet gleamed in the dim light. Then a young man stepped from the crowd, raised a pale wooden cane over his head, and brought the full force of it down on the face of the helpless trick-or-treater still lying on his back in the street.

Sickened, I turned from the window to dial 911. A recorded voice told me, "All lines are busy. Please hold" (a worst-case scenario if there ever was one). Seconds later an operator's voice was there, calm and professional, asking me the questions she needed to know.

"Does he need an ambulance?" she asked.

"He's lying in the middle of the street," I said.

"Which way are they headed?"

"Toward Fillmore."

"The police are on their way."

Within half an hour the police had picked up the suspect a block away, located the victim (who had been driven to the hospital by passersby), called me back twice, and were looking for the driver of the red motorcycle, who had just spent what surely must have been some of the longest minutes of his life out on the street in front of my apartment building.

When the police officer told me that the perpetrator of this vicious act was 15 years old, I thought of the Million Man March in Washington, D.C. I wondered if there was a father in this boy's life. Was there ever a man there for him to teach him how to be a man? Was there ever a man there for him to tell him that you don't beat somebody when they're already down?

Was there ever a man there to show him by example how to keep his head when all the people about him are losing theirs? Where did he learn such vicious politics at the age of 15? By what measure of anger did this boy justify slicing up someone's eye, robbing him, and leaving him crying out in pain on a street while his friends looked on? Is that what a real man would do? In what convoluted circles do these acts add stature and prestige?

I cannot get the police officer's words out of my head: "That kid is going to sit for a long time." In the space of a few minutes, in the early evening darkness of Halloween, two young lives derailed. One black. One white. I wish I knew why.

Marianne Kelly is a freelance writer.

Columbia Journalism Review

cable: who's connected?

Even before they've reached the nation's cable boxes, the partisan political channels (see "I'm Not a Reporter, But I Play One On GOP-TV," CJR, September/October 1994) are causing controversy. This past January, the nation's largest cable operator, Tele-Communications, Inc., announced plans to offer a package of political channels to its 12 million cable subscribers by the end of 1996. Among the likely channels: National Empowerment Television, a twenty-four-hour conservative channel best known for carrying Newt Gingrich's *Progress Report*, which already has its affiliation agreement with TCI; and the Conservative Television Network, planned by Republican strategist Anthony Fabrizio.

The conservative nature of these channels has raised the ire of The '90s Channel, the nation's leading liberal cable outfit. While his ideological opposites are granted the promise of a national audience, '90s Channel president John Schwartz says TCI has actively shut his channel out, raising leased access rates on the seven local systems that now carry it, and excluding it from the political package. "TCI has never invited us to be part of their political package," Schwartz says. "It looks like we don't fit in with what they want to program."

"The marketplace is the marketplace," responds TCI vice president Robert Thomson, who explains that the present package lineup, while predominantly conservative, represents simply those channels that have demonstrated the necessary financial and technical wherewithal. "We need to be sure that the channels, even if they don't start with twenty-four hours of programming, have the means to do so in a reasonable time," Thomson says. "We don't see the '90s Channel as likely to develop broad appeal." Still, Thomson says that in the name of ideological equality, TCI has "offered some limited financial assistance . . . to Democratic members of Congress and party officials" who have shown interest in creating their own version of NET and CTN.

According to Andrew Schwartzman of the nonpartisan Media Access Project, this concern with cash flow is precisely the criterion that makes conservative channels more likely to thrive than more liberal ones. "The business community has a natural alliance with a channel that's going to promote a flat tax or deregulation," Schwartzman says.

With TCI's package set to debut on a limited basis before the 1996 elections, the 90's Channel has little time to raise money to meet TCI's standards. "If TCI would offer us inclusion in the package first," Schwartz notes, "we'd have a tremendous advantage in raising the cash to go full time and meet their criteria. But that's a vicious circle."

Thomas Goetz

Goetz is a New York writer.

THE DENVER POST
Thursday, November 2, 1995

'Liberal' network no more

90's Channel folds after TCI rate hike

By Stephen Keating
Denver Post Business Writer

The 90's Channel of Boulder, once described by Phil Donahue as "the country's only full-time liberal network," went off the air at midnight yesterday in seven major markets, including the Denver/Boulder area.

The tiny network cited "a massive rate increase" sought by Englewood-based cable-TV giant Tele-Communications Inc. as the reason for pulling the plug.

"We had offered to pay them $7,000 a month, a substantial increase," said John Schwartz, president of The 90's Channel and founder of public-TV station KBDI in Broomfield.

TCI wanted $250,000 a month to continue airing the network. Schwartz said there was "ideological antagonism" between The 90's Channel and TCI, but a TCI spokeswoman said it was simply a business decision.

> 'Another independent voice is being silenced.'
>
> Jeff Cohen, Fairness and Accuracy in Reporting

On Tuesday, the Federal Communications Commission denied The 90's Channel's request for a stay of the rate increase.

"The monopolization of American televisions took another step forward — another independent voice is being silenced," said Jeff Cohen, director of the New York-based Fairness and Accuracy in Reporting.

The 90's Channel was seen on Channel 90 in the Denver/Boulder area, and aired in six other markets, including Baltimore and Los Angeles.

A 1992 court action kept TCI from dropping the network after TCI absorbed United Cable, which had a contract through 1995 with The 90's Channel.

Recent negotiations to keep the network on were unsuccessful, said TCI spokeswoman Lela Cocoros. She said some viewers had complained about "content and repetition of programming," adding that, "Two to four hours a week does not a network make."

The 90's Channel, in its own words, "aired programs championing the perspectives of working men and women, promoting human and civil rights, exposing corporate and government corruption."

Its four hours a week of original programming were interspersed with other shows and infomercials. Schwartz said The 90's Channel effort continues with Free Speech TV, carried part time on 44 cable channels nationwide, serving 4.2 million households.